STAMP AND RETURN

VIRGINIA:

IN THE CIRCUIT COURT FOR HENRICO COUNTY

DEVIN G. NUNES,

Plaintiff,

v.

TWITTER, INC.,
ELIZABETH A. "LIZ" MAIR,
MAIR STRATEGIES LLC,
"DEVIN NUNES' MOM"
[@DevinNunesMom]
"DEVIN NUNES' COW"
[@DevinCow]

Defendants.

Case No. CL19001715-00

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS
ON GROUNDS OF *FORUM NON CONVENIENS*
BY ELIZABETH A. MAIR AND MAIR STRATEGIES LLC

Roberta A. Kaplan
Joshua Matz
Benjamin Margo
KAPLAN HECKER & FINK LLP
350 Fifth Avenue, Suite 7110
New York, New York 10118
(212) 763-0883
rkaplan@kaplanhecker.com
jmatz@kaplanhecker.com
bmargo@kaplanhecker.com

Amy Neuhardt (VSB # 88263)
Karen L. Dunn
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, NW
Washington, DC 20005
(202) 274-1137
(202) 237-6131 (facsimile)
aneuhardt@bsfllp.com
kdunn@bsfllp.com

Counsel to Defendants Elizabeth A. Mair & Mair Strategies LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT

Under well-settled principles of *forum non conveniens*, this case belongs in California, not Virginia. The Plaintiff, Devin Nunes, represents a congressional district in California and has no particular connection to Virginia. He lodges most of his claims, and levels most of his factual allegations, against Twitter, a California-based company. The evidence and witnesses necessary to evaluate these allegations are located almost entirely in California, far beyond the scope of this Court's power of compulsory process. Under Virginia choice of law rules, California law will govern many or all of Mr. Nunes's claims. Further, the primary injury of which he complains—a more challenging re-election campaign in 2018 *for his congressional seat in California*—occurred entirely in California and evokes distinctly Californian interests. And the injunctive relief he seeks would involve this Court in ongoing monitoring of a California social media company. Simply put, Mr. Nunes's home state of California is a far more convenient and practical forum with a far greater nexus to the present dispute, and that is the whole point of the doctrine of *forum non conveniens*.

Apart from Twitter's flimsy connection to Henrico County—consisting of a registered agent—Liz Mair and her business (together, "Ms. Mair") supply the only apparent connection between this case and Virginia. Yet the gravamen of Mr. Nunes's claim against her is that she retweeted, and offered opinions based on,

claims published by a California newspaper about his involvement in a California winery, and thereby injured him in a California election. For these claims, too, California law would apply, and most relevant evidence and witnesses are in California.

Virginia is therefore an inappropriate forum for this dispute, which consists mainly of a complaint against Twitter—the only defendant conceivably capable of satisfying Mr. Nunes's claim for $250 million in damages. Ms. Mair is a bit player in that drama. She is willing to submit to the jurisdiction of the California courts for the sake of ensuring a rational, efficient, and convenient resolution of the questions posed by this suit by a California congressman about his California election. *See* Declaration of Elizabeth A. Mair.

The Supreme Court of Virginia has warned that "[a] plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary." *Norfolk & W. Ry. Co. v. Williams*, 239 Va. 390, 392 (1990) (citation omitted). But here, presumably because he does not like the law of his home state of California and mistakenly believes he can avoid its application here, Mr. Nunes has given that strategy a strange new twist, seeking to force the trial at a most inconvenient place for everyone involved. *See Virginia Radiology Assocs., P.C. v. Culpeper Mem. Hosp., Inc.*, 21 Va. Cir. 157, 1990 WL 10039343, at *2 (Va. Cir. Ct. Fairfax 1990) ("The fact that no forum will be entirely

convenient to all of the parties obviously does not give the plaintiff the right to pick the forum which is the most inconvenient.").

Ultimately, there is no good reason to try this case in Virginia, despite Mr. Nunes's apparent efforts to use Ms. Mair as a jurisdictional anchor. If the California congressman truly believes that California companies engaged in a vast conspiracy to sway his California constituents by making (or allowing) statements about his conduct in California, he should be required to pursue those claims in California. Every recognized principle of *forum non conveniens* analysis—not to mention common sense—supports that conclusion.

Ms. Mair therefore respectfully requests that the Court dismiss this case on grounds of *forum non conveniens* pursuant to Virginia Code section 8.01–265(i).[1]

BACKGROUND

Plaintiff Devin Nunes is a citizen of California and currently represents California's 22nd Congressional District. *See* Compl. ¶ 3. In November 2018, his California constituents re-elected him to serve in Congress, though by a narrower margin than in previous elections. *Id.* ¶ 5. He blames this reduced margin principally on Twitter, which is headquartered in California. *Id.* ¶¶ 6, 31. He

[1] Ms. Mair expressly reserves the right to file responsive pleadings addressing the merits of Plaintiff's Complaint in the event that her motion to dismiss on the grounds of *forum non conveniens* is not granted, including but not limited to a demurrer for failure to state a claim, Va. Code. § 8.01-273, and a motion to strike under the California anti-SLAPP statute, *see* Cal. Civ. Proc. Code § 425.16.

alleges that Twitter orchestrated a wide-ranging, nefarious scheme to "squelch the voice and assassinate the character of its political opponents." *Id.* ¶ 6. This scheme supposedly included "shadow-banning" conservatives (thus reducing the visibility of their tweets). *Id.* ¶ 29 & n. 19. It also involved numerous practices prohibited by Twitter's Terms of Service, all in an effort to "amplify the abusive and hateful content" posted by Mr. Nunes's critics, *id.* ¶ 30.

Mr. Nunes identifies several such critics in the Complaint. Two of them, both named as defendants, are anonymous Twitter users with no apparent connection to Virginia. *See id.* ¶ 9 (@DevinNunesMom); *id.* ¶ 10 (@DevinCow). In the same vein, Mr. Nunes speculates about a vast, highly coordinated conspiracy among "many" accounts whose "sole purpose was (and is) to publish . . . false and defamatory statements about Nunes." *Id.* ¶ 12. There is no suggestion anywhere in the Complaint that any of these accounts has any known connection to Virginia.

The remaining named defendant is Ms. Mair, a Virginia resident; Mr. Nunes has sued both her and her business, Mair Strategies, LLC. *See id.* ¶¶ 7-8. Most of his allegations against Ms. Mair relate to reports by *The Fresno Bee*, Mr. Nunes's hometown paper in California, about alleged illegal conduct at the Alpha Omega Winery, a California venture in which Mr. Nunes is an investor. *See* ¶ 7 & nn. 9-11. Specifically, in May 2018, the *Fresno Bee* reported on claims in a California lawsuit that the winery had hosted a yacht cruise involving prostitutes and cocaine.

See Mackenzie Mays, *A yacht, cocaine, prostitutes: Winery partly owned by Nunes sued after fundraiser event*, THE FRESNO BEE (May 23, 2018), *available at* https://www.fresnobee.com/news/business/article210912434.html. Following publication of that report, Ms. Mair sought to highlight it for lawmakers and voters; she wrote to the Office of Congressional Ethics in Washington, D.C., *see* Compl. ¶ 7 & n. 11, and tweeted the article's headline with the preface "HOLY CRAP," *id.* ¶ 7. In response to a tweet by Mr. Nunes stating that "nothing surprises [him] any more," she tweeted, "To be fair, I think the @fresnobee writing up your investment in a winery that allegedly used underage hookers to solicit investment—an allegation you've known about for years, during which you've stayed invested in it, I might add—did surprise you." *Id.* Elsewhere, Ms. Mair posted unflattering newspaper headlines about Mr. Nunes (none from Virginia-based newspapers) and satirized him for running out of a hearing in Washington while avoiding questions from *The Fresno Bee*. *Id.*

In Mr. Nunes's view, these statements about a California elected official all qualify as defamation. *See id.* ¶¶ 39-47. He alleges that they injured him only by affecting his re-election prospects in California and by interfering with his job performance in Washington. *Id.* ¶ 2. Mr. Nunes seeks $250 million in damages from all defendants, as well as an injunction ordering Twitter to unmask various

anonymous users, to suspend those users and Ms. Mair, and to delete links to all tweets referenced in the Complaint. *Id.* ¶¶ 57, 59.

ARGUMENT

This case does not belong in Virginia. Litigating it here would be profoundly inconvenient and burdensome for everyone involved. Although a plaintiff is typically entitled to a presumption of correctness in his choice of forum, that presumption "is not absolute." *Williams*, 239 Va. at 394. Virginia Code section 8.01-265 expressly authorizes *forum non conveniens* dismissal of an action "upon motion by any party and for good cause shown" where the action is "brought by a person who is not a resident of the Commonwealth," "the cause of action arose outside of the Commonwealth," and "the court determines that a more convenient forum which has jurisdiction over all parties is available in a jurisdiction other than the Commonwealth." Section 8.01-265 further provides that "[g]ood cause shall be deemed to include, but not be limited to . . . the avoidance of substantial inconvenience to the parties or the witnesses." As the Virginia Supreme Court has explained, "[c]areful consideration of the facts, a balancing of the competing interests, and an analysis of the appropriate principles must be undertaken in each case." *Williams*, 239 Va. at 393.

Here, as discussed below, all these factors weigh decisively in favor of dismissal. Although Ms. Mair's presence in the case lends it a "technical, formal

connection with the original court chosen," *id.* at 395-96, that is not enough to defeat a motion seeking dismissal in favor of a "more convenient forum with a strong 'practical nexus'" to the dispute, *Budd v. Norfolk S. Ry. Co.*, 90 Va. Cir. 227, 2015 WL 10521441, at *2 (Va. Cir. Ct. Norfolk 2015) (quoting *Williams*, 239 Va. at 396).

A. The Plaintiff is Not A Resident of Virginia

Section 8.01-265 applies in cases where the plaintiff is not a "resident of the Commonwealth." That element is satisfied: Mr. Nunes is "a citizen of California." Compl. ¶ 3. He alleges no basis for residency in Virginia.

B. The Causes of Action All Arose in California and Washington

Section 8.01-265 further requires that "the cause of action arose outside of the Commonwealth." Each cause of action alleged here is a tort. And causes of action sounding in tort arise where the injury occurs. *See, e.g.*, *Spangler v. Wintergreen Partners, Inc.*, 23 Va. Cir. 502, 1991 WL 11765193, at *2 (Va. Cir. Ct. Albemarle 1991) ("The cause of action arose in Nelson County, where the plaintiff fell while skiing."); *Slone v. Hickok*, 20 Va. Cir. 325, 1990 WL 10039310, at *2 (Va. Cir. Ct. Roanoke 1990) (holding that where an accident injured plaintiff in Botetourt County "[t]he cause of action arose in Botetourt County"); *Wilkerson v. S. Ry. Co.*, 21 Va. Cir. 290, 1990 WL 751298, at *2 (Va. Cir. Ct. Richmond 1990) (holding that where the alleged injury occurred in North Carolina, "the cause

of action did not arise in [Virginia]"). Indeed, Virginia courts have specifically recognized that a cause of action for defamation arises not where the statement is written, but rather where it ultimately causes injury. *See Rilee v. Rilee*, 74 Va. Cir. 90, 2007 WL 5282040, at *1 (Va. Cir. Ct. Richmond 2007) (holding that a "plaintiff's cause of action 'arose' in Alexandria" where an allegedly defamatory letter was sent there).

Here, Mr. Nunes alleges that he suffered harm in California (a tougher re-election campaign) and Washington (interference with his official duties). He does not allege any injury in Virginia resulting from the publication of the alleged defamatory statements on a global internet platform, nor could he reasonably do so: injury in a defamation suit occurs—and a claim arises—where the plaintiff resides and suffers reputational damage. *Cf. Calder v. Jones*, 465 U.S. 783, 788–89 (1984) (holding that California had jurisdiction over a tort suit against journalists in Florida because, *inter alia*, "the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California"). Mr. Nunes, a California congressman, did not suffer any cognizable harm in Virginia. Further, to the extent it is even relevant, the vast majority of the allegedly unlawful conduct described in the Complaint occurred outside Virginia.

C. There is a More Convenient Forum with Jurisdiction Over All Parties

The next question under Section 8.01-265 is whether a "more convenient forum which has jurisdiction over all parties is available in a jurisdiction other than the Commonwealth." The answer is yes. Whereas there are substantial reasons to doubt this Court's jurisdiction over Twitter, California courts would surely possess such jurisdiction. *See* Mem. ISO Mot. to Dismiss of Twitter, Inc. (filed May 9, 2019) ("Twitter Motion to Dismiss") at 5-13. Further, although the Doe Defendants are irrelevant to *forum non conveniens* analysis, *see P.E.A. Films, Inc. v. Metro-Goldwyn-Mayer, Inc.*, No. 96 Civ. 7228, 1998 WL 54610, at *4 (S.D.N.Y. Feb. 10, 1998), California courts would likely also have jurisdiction over the Doe Defendants by virtue of those defendants' consent to the Twitter Terms of Service, *see* Twitter Motion to Dismiss at 13-15. Finally, in light of the other considerations set forth in this motion, Ms. Mair would consent to jurisdiction in California to ensure a rational, efficient, and convenient resolution of this lawsuit.

D. There is Good Cause to Dismiss in Favor of a California Forum

When the statutory elements are satisfied, as they are here, the ultimate issue is whether it makes sense for a case to be litigated in Virginia—or, put differently, whether there is "good cause" to dismiss in favor of a more convenient forum.

Good cause may consist of a desire to avoid "substantial inconvenience to the parties or the witnesses." Va. Code § 8.01-265. It may also reflect judgments about the "relative ease of access to sources of proof," "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses," and "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Williams*, 239 Va. at 393 (citation omitted). For many overlapping reasons, the Court should conclude that this litigation belongs in California, rather than in Virginia.

First, the interests at stake here are distinctly and overwhelmingly Californian in nature. This case was filed by a California congressman. His primary allegation is against a California-based social media company, which he accuses of conspiring with many of its own users to skew speech and influence a California election. Mr. Nunes's secondary allegations against Ms. Mair—the only Virginian here—arise mainly from her own statements regarding a California newspaper's report about a California lawsuit bearing on his continued investment in a California winery. These claims deserve to be heard in Mr. Nunes's home state.

Indeed, it is difficult to understand what theory of forum shopping led Mr. Nunes to Henrico County, Virginia, where no parties to this case reside. We can only assume that Mr. Nunes filed this case in Virginia because of his (mistaken)

belief that if he filed in Virginia, its statute limiting strategic lawsuits against public participation (a.k.a. its anti-SLAPP statute), *see* Va. Code § 8.01-223.2, would apply and the Virginia statute offers less protection to defendants in defamation suits than does the analogous anti-SLAPP statute in California, *see* Cal. Civ. Proc. Code § 425.16. If that is why Mr. Nunes filed his case here, it hardly suggests confidence in his own claims. Regardless, for the reasons given below, Virginia choice of law doctrine requires the application of California law to this case. Mr. Nunes, an elected representative from the state of California, cannot so easily escape the strict requirements of the law of his home state.

Second, nearly all relevant evidence and witnesses are in California. That is where Mr. Nunes himself and Twitter are based. It is where evidence about Twitter's content moderation decisions, and Twitter's supposed conspiracy, is most likely to be found. It is where Mr. Nunes's alleged electoral injury occurred and, therefore, where any evidence of that injury is likely to be discovered. It is where Mr. Nunes engaged in the conduct addressed by the many of the alleged defamatory statements. And it is where evidence bearing on the truth or falsity of those statements will be located (including evidence relating to *The Fresno Bee*'s report on the Alpha Omega Winery and Mr. Nunes's knowledge of any wrongdoing there).

Simply stated, nearly all of the relevant documents, databases, and witnesses are located in California; the main exception is Ms. Mair, who lives in Virginia (though not in Henrico County).[2] Litigating this case in Virginia would therefore result in a "substantial inconvenience to the parties [and] the witnesses." Va. Code § 8.01-265. It would also defeat "relative ease of access to sources of proof," *Williams*, 239 Va. at 393 (citation omitted), and force most parties and witnesses to spend one or more nights "away from families, homes, and jobs while traveling to [Henrico] to testify," *id.* at 395. Relatedly, keeping the case in Henrico County could cause meaningful, ongoing complications relating to the "availability of compulsory process for attendance of unwilling . . . witnesses." *Id.*

Third, it is widely recognized that courts may view choice of law as relevant to *forum non conveniens* analysis. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 234, 241 n.6 (1981) (holding that federal courts applying *forum non conveniens* doctrine may account for "the interest in having the trial . . . in a forum that is at home with the law that must govern the action"). Here, California law would apply. Mr. Nunes is bound by Twitter's terms of service, which require the application of California law. And as Judge Moon recently explained in a thorough analysis of Virginia choice of law precedent, the rights of the parties in a multi-state

[2] For the reasons given by Twitter in its own motion to dismiss, the presence of a registered agent does not support a finding that Twitter is at home in Virginia. *See* Twitter Motion to Dismiss at 5-7.

defamation suit involving online speech are governed by the law of "the state where the plaintiff is injured as a result of the allegedly tortious conduct," which is ordinarily where he "lives and works." *Gilmore v. Jones*, 18 Civ. 17, 2019 WL 1418291, at *18-20 (W.D. Va. Mar. 29, 2019). Applied to this case, Virginia choice of law doctrine would therefore point directly to California. Given that California law will inevitably govern, it is sensible and convenient to dismiss this case and require that it be litigated in the California courts.

Fourth, the relief sought here includes an injunction against Twitter requiring it to unmask several people who exercised their First Amendment right to speak anonymously, and to censor all "tweets, retweets, replies and likes by Liz Mair, @DevinNunesMom and @DevinCow that contain false and defamatory statements about Nunes." Compl. ¶ 59. Relief of this kind is extraordinary. Even if Mr. Nunes's claims possessed any merit (which they do not), his proposed injunction would raise a separate host of difficult factual and constitutional problems. Rather than seek to manage a complex injunction against a social media company that is based hundreds of miles away, it would be prudent for this Court to dismiss in favor of California courts, which have easy access to any necessary witnesses and well-known expertise in crafting and implementing such exceptional orders.

Finally, Mr. Nunes recently filed a very similar lawsuit in Albemarle County against Ms. Mair and the McClatchy Company, which is headquartered in California and owns *The Fresno Bee*. *See* Am. Compl., *Nunes v. McClatchy et al.*, CL19000629-00 (filed Apr. 12, 2019) (Attached as Exhibit A to the Declaration of Roberta Kaplan). There, as here, Mr. Nunes focuses on *The Fresno Bee*'s report concerning allegations of cocaine and prostitutes at a yacht party hosted by the Alpha Omega Winery, in which Mr. Nunes invests. And there, as here, Ms. Mair intends to file a motion seeking dismissal on grounds of *forum non conveniens*. Rather than force the parties to litigate these closely related suits in separate Virginia courthouses, it would be more appropriate to litigate their shared questions of law and fact in a single California judicial proceeding.

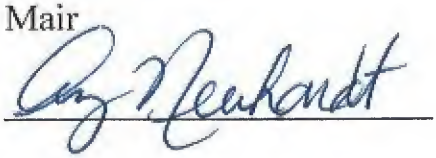
CONCLUSION

For the foregoing reasons, Ms. Mair respectfully requests the Court dismiss Mr. Nunes's Complaint on grounds of *forum non conveniens*. Pursuant to Virginia Code section 8.01-265, Ms. Mair respectfully proposes that Mr. Nunes be afforded a three-month extension of the applicable statutes of limitations to re-file in California.

Dated: May 14, 2019

Respectfully submitted,

Elizabeth A. Mair

By Counsel: 

Roberta A. Kaplan
Joshua Matz
Benjamin Margo
KAPLAN HECKER & FINK LLP
350 Fifth Avenue, Suite 7110
New York, New York 10118
(212) 763-0883
rkaplan@kaplanhecker.com
jmatz@kaplanhecker.com
bmargo@kaplanhecker.com

Amy Neuhardt (VSB # 88263)
Karen L. Dunn
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, NW
Washington, DC, 20005
(202) 274-1137
(202) 237-6131 (facsimile)
aneuhardt@bsfllp.com
kdunn@bsfllp.com

Counsel to Defendants Elizabeth A. Mair & Mair Strategies LLC

CERTIFICATE OF SERVICE

I certify that on this 14th day of May, 2019, a copy of the foregoing Memorandum of Law in Support of Motion to Dismiss on Grounds of *Forum Non Conveniens* shall be served by first class mail, postage prepaid, and by email, upon:

Steven S. Biss
300 West Main Street, Suite 102
Charlottesville, Virginia 22903
stevenbiss@earthlink.net

Counsel for Plaintiff Devin G. Nunes

Charles K. Seyfarth
Elizabeth Scott Turner
O'Hagan Meyer
411 East Franklin Street, Suite 500
Richmond, Virginia 23219
cseyfarth@ohaganmeyer.com
eturner@ohaganmeyer.com

Patrick J. Carome
Ari Holtzblatt
Wilmer Cutler Pickering Hale & Dorr LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
patrick.carome@wilmerhale.com
ari.holtzblatt@wilmerhale.com

Counsel for Specially-Appearing Defendant Twitter, Inc.

Amy Neuhardt (VSB # 88263)
1401 New York Avenue, NW
Washington, DC 20005
(202) 274-1137
(202) 237-6131 (facsimile)
aneuhardt@bsfllp.com